

NOT FOR CITATION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

HONG XUN,

Plaintiff,

v.

JOHN STEWART COMPANY, et al.,

Defendants.

No. C 05-1437 PJH

**ORDER GRANTING MOTION FOR
LEAVE TO AMEND COMPLAINT AND
AND DENYING MOTION TO DISMISS**

Pro se plaintiff Hong Xun filed this action on April 7, 2005, alleging discrimination in housing. On May 6, 2005, defendants filed a notice of motion and motion to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). The notice and motion were defective in two respects. Defendants did not submit points and authorities in support of the motion. See Civ. L.R. 7-4. In addition, defendants noticed the hearing for June 18, 2005, a Saturday.

On May 17, 2005, plaintiff filed a motion for leave to amend the complaint. On May 23, 2005, defendants filed an amended notice of motion and motion to dismiss, re-noticing the hearing for June 22, 2005. The amended motion is identical to the previously-filed motion. Attached to the amended notice was a certificate of service stating that a copy of the amended notice and motion had been mailed to plaintiff on May 9, 2005. On June 7, 2005, defendants filed what appears to be an identical re-notice of motion, also accompanied by a

1 certificate of service showing service by mail on May 9, 2005.

2 Plaintiff has not filed an opposition to the motion to dismiss, and defendants have not
3 filed an opposition to the motion to amend the complaint. Ordinarily, when a plaintiff files a
4 motion for leave to amend after a motion to dismiss has been filed, and in lieu of filing an
5 opposition to the motion to dismiss, the court first addresses the motion to dismiss the original
6 complaint and then grants plaintiff leave to amend the complaint (assuming subject matter
7 jurisdiction). In this case, however, defendants' motion lacks appropriate legal support.
8 Accordingly, the court finds that defendants' motion should be DENIED and that plaintiff's
9 motion should be GRANTED. The date previously noticed for the hearing on defendants'
10 motion to dismiss is VACATED. Plaintiff shall file the first amended complaint no later than
11 June 22, 2005.

12 Defendants may file a motion to dismiss the first amended complaint. The motion shall
13 be filed no later than July 13, 2005. The motion shall be noticed for hearing on Wednesday,
14 August 31, 2005, at 9:00 a.m. If defendants serve the motion by regular first-class mail, it
15 must be served no fewer than three business days prior to the July 13, 2005 deadline.
16 Plaintiff's opposition shall be filed no later than August 3, 2005, and if plaintiff elects to serve
17 defendants by mail, the opposition must be mailed no later than three business days prior to
18 the August 3, 2005, deadline. Defendants' reply shall be filed no later than August 17, 2005.
19 If defendants elect to serve plaintiff by mail, the reply shall be mailed no later than three
20 business days prior to the August 17, 2005, deadline. See Civ. L.R. 5-5.

21 The date for the initial case management conference, previously set for August 18,
22 2005, has been CONTINUED to Thursday, September 22, 2005, at 2:30 p.m.

23
24 **IT IS SO ORDERED.**

25 Dated: June 9, 2005

26 
27 PHYLLIS J. HAMILTON
28 United States District Judge

United States District Court

For the Northern District of California

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